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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION	Civil Case No. 3:07-cv-05634-CRB MDL No. 1913
This Document Relates to: All Actions	**PLAINTIFFS' OPPOSITION TO CATHAY PACIFIC AIRWAYS LTD.'S' MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT** Date: March 12, 2010 Time: 10:00 a.m. Ctrm: 8, 19th Floor Judge: The Honorable Charles R. Breyer

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I. STATEMENT OF ISSUES TO BE DECIDED

(1) Whether this Court should grant antitrust immunity to Cathay Pacific even though it fails to demonstrate that it files rates with the U.S. Department of Transportation and the Hong Kong Civil Aviation Department that those rates have been duly reviewed and authorized and that Cathay Pacific actually charged those rates.

(2) Whether the detailed allegations of the Consolidated Amended Complaint raise a plausible inference of an illegal price-fixing conspiracy under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

II. INTRODUCTION

Defendant Cathay Pacific Airways Ltd.'s ("Cathay Pacific") motion to dismiss should be denied.[1] Cathay Pacific asserts that Plaintiffs' claims against it should be dismissed under the filed rate doctrine because it supposedly is required to file "tariffs" with the Hong Kong Civil Aviation Department ("CAD") and the U.S. Department of Transportation ("DOT") concerning its air passenger service between Hong Kong and the United States. Cathay Pacific does not provide any reason or authority for extending the filed rate doctrine to filings with foreign agencies, and there is none. The underlying considerations of the filed rate doctrine do not comport with applying the doctrine to filings in other countries. Nor does the filed rate doctrine argument apply as a matter of law to Cathay Pacific's filings with the DOT, the scope and details of which have not been established. Even if the filed rate doctrine were applicable to Defendant's antitrust violations, important questions of fact that can only be determined through discovery must be answered before any such determination could be made.

Cathay Pacific's challenge to the sufficiency of Plaintiffs' Consolidated Class Action Complaint ("CAC") should be rejected because the CAC contains detailed and specific fact allegations that demonstrate Cathay Pacific's participation in a wide-ranging conspiracy to fix the price of passenger air transportation between the United States and Asia/Oceania. These

[1] This Opposition incorporates by reference Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss, which Cathay Pacific joins by reference.

allegations are far more detailed and specific than is required under *Bell Atlantic v. Twombly,* 550 U.S. 544 (2007) ("*Twombly*").

III. ARGUMENT

A. The Filed Rate Doctrine Does Not Bar Plaintiffs' Claims

1. The Filed Rate Doctrine Does not Apply to Filings with Foreign Regulatory Agencies.

Cathay Pacific's argument that tariffs filed with the Hong Kong CAD bar Plaintiffs' antitrust claims under the filed rate doctrine would, if accepted, create an entirely new and unwarranted exception to U.S. antitrust laws. No court has ever applied the filed rate doctrine to filings made with a foreign regulator. Cathay Pacific does not cite any authority supporting such an extension of the filed rate doctrine, and does not provide any reason for this Court to extend this doctrine to filings in other countries.

The underlying considerations for the filed rate doctrine do not support its application to foreign filings. "The doctrine is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for specified utilities, originally through rate-setting procedures involving filing of rates with the agencies. The filed rate doctrine was first applied to rates filed with the Interstate Commerce Commission under the Interstate Commerce Act." *E.&J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1033 (9th Cir. 2007) ("*Gallo*"). It was originally designed to "ensure equality of rates to all and destroy favoritism."[2] The underlying considerations for the filed rate doctrine, as it evolved, include deference to a congressional scheme of uniform rate regulation, concern with potential usurpation of a function that Congress has assigned to a regulatory body in contravention of the Supremacy Clause and designated agencies' rate-making authority to set "reasonable, nondiscriminatory rates."[3] Such deference to the designated regulatory bodies is not only grounded in the separation

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[2] Jim Rossi, Lowering the Tariff Shield: Judicial Enforcement for a Deregulatory Era, 56 Vand. L. Rev. 1591, 1599 (2003) (quoting *New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n*, 200 U.S. 361 (1906)).

[3] *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 579-80 (1980) ("*Arkla*"). *See also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986) ("*Square D*") (the filed rate

of powers, but also a presumption that legislatively appointed regulatory bodies have institutional competence to address rate-making issues. [4]

These underlying considerations for the filed rate doctrine do not support application of the doctrine to filings made with foreign agencies. Congress has not entrusted any foreign agency with rate-setting authority, and therefore there is no concern with the Supremacy Clause, separation of powers, or undermining a congressional scheme of uniform rate regulation. There is no basis to assume that foreign agencies are competent to set "reasonable, nondiscriminatory rates." Likewise, there is no reason to assume that foreign agencies administer and enforce filings in a way that is consistent with the filed rate doctrine, or that foreign agencies can be entrusted with the responsibility of maintaining the fundamental United States policy of protecting competition and consumers. In fact, as Cathay Pacific admits: "[t]hroughout the time of the events alleged in the CAC, Hong Kong had no comprehensive competition or antitrust statute. That remains the case today." Memorandum of Points and Authorities in Support of Cathay Pacific Airways Ltd.'s Motion to Dismiss ("Cathay Pacific Br.") at 3 n. 3. The Agreement between the Government of Hong Kong and the Government of the United States of America Concerning Air Services, which Cathay Pacific cites, was to provide "the framework for air services between Hong Kong and the United States of America." It does not provide a mechanism for consumers to resolve any claims they may have with the airlines with respect to overcharges.

The application of the filed rate doctrine to this case would be an unprecedented expansion of the doctrine, which courts repeatedly have cautioned against. As the Supreme Court has stated, "our precedents consistently held that exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). *See also*

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doctrine preserves the rate-making authority of federal agencies that has been delegated by Congress).

[4] The filed rate doctrine has been "vigorously criticized." *Cost Management Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 944 (9th Cir. 1996) ("*Cost Management*") . Although the Supreme Court agreed that the doctrine "was unwise as a matter of policy," it concluded an overruling of the filed rate must come from the Congress and not it. *Square D*, 476 U.S. at 420, 424.

Square D , 476 U.S. at 421; *U.S. v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005) ("*Gosselin*"); *Shaw v. Dallas Cowboys Football Club Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999); *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 961 F.2d 669, 671-672 (7th Cir. 1992). "This narrow construction of antitrust immunity is appropriate because the robust marketplace competition that antitrust laws protect is a fundamental national economic policy." *Gosselin*, 411 F.3d at 508 (quoting *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966)).

2. Cathay Pacific Fails to Establish that Its Filings with the DOT Support Applying the Filed Rate Doctrine to Plaintiffs' Claims

This portion of Cathay Pacific's brief duplicates the joint brief filed by all defendants, and Plaintiffs' respectfully refer the Court to their opposition to the defendants' joint brief for a more complete discussion of why the filed rate doctrine does not bar Plaintiffs' claims.

The filed rate doctrine is an affirmative defense. *Gallo*, 503 F.3d at 1039, fn. 11. Such a defense cannot be the basis of a motion to dismiss unless the complaint itself supplies the basis. *See Quillen v. Barclay's American Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984); *DiMella v. Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988).

To meet its burden, Cathay Pacific must establish that on its face, the CAC shows that: (1) Cathay Pacific is required to and has indeed filed all its base fares and fuel surcharges with the DOT for its transpacific passenger transportation services; and (2) the DOT has conducted meaningful review of all filings of fares and fuel surcharges during the Class Period. This burden has not been met. Cathay Pacific cannot establish as a matter of law that it has in fact filed the fares and especially the fuel surcharges at issue in this case, and that such fares and fuel surcharge filings, if any, were meaningfully reviewed and approved by the DOT.

On the face of the statute, Cathay Pacific is required to file with the DOT only fares and baggage charges, not fuel surcharges. Cathay Pacific is required to "file with the [DOT], and provide and keep open to public inspection, *tariffs showing all fares, and charges* for foreign air transportation between points served by it … and showing… all classifications, rules, regulations,

practices, and services in connection with such foreign transportation." 14 C.F.R. § 221.2(a) (italics added). "Passenger tariff means a tariff containing fares, charges, or governing provisions applicable to the foreign air transportation of persons and their baggage." 14 C.F.R. § 221.3. "Fare means the amount of per passenger or group of persons stated in the applicable tariff for the air transportation thereof and includes baggage unless the context otherwise requires." *Id.* "Charge means the amount charged for baggage, in excess of the free allowance, accompanying or checked by a passenger or for any other service ancillary to the passenger's carriage." *Id.* Notably, *fuel* surcharges are not included in the definitions of "passenger tariff," "fare" and "charge."

It is telling that Defendants, including Cathay Pacific, unsuccessfully attempted to obtain immunity from the DOT for their joint proposal for a collective fuel surcharge, in the name of a "Special Enabling Resolution" of IATA. CAC, ¶¶ 184-185. The DOT did not act on this request. CAC, ¶¶ 182-90. Indeed, the DOT has stated that it does not and cannot review fuel surcharges, explaining: "the desire of carriers to pass on the higher costs of certain expenses discretely, such as insurance and fuel, has led to such expenses being filed separately from the 'base' fare in tariffs, a situation that the Department *cannot effectively monitor*."[5] Therefore, these unauthorized and unmonitored fuel surcharges are outside the scope of the filed rate doctrine. *See Gallo*, 503 F. 3d at 1048 (lack of enforcement by agency precludes application of filed rate doctrine to non- FERC-authorized rates).

There is indication that Cathay Pacific and the other defendants have not strictly complied with the applicable tariff filings in their sales. Cathay Pacific routinely sells below tariff pricings. *See* DOT Order 99-4-19, 1999 D.O.T. Av. LEXIS 147 (D.O.T. April 29, 1999). The DOT has declined to prosecute instances of rebating unless there is clear evidence of consumer fraud or

[5] Notice of Disclosure of Higher Prices for Airfare Purchased over Telephone Reservation Centers or at Airline Ticket Offices, and Surcharges that May Be Listed Separately in Fare Advertisement, 69 Fed. Reg. 219, 65677 (D.O.T. Nov. 15, 2004), Request for Judicial Notice ("RJN") Exhibit DD.

deception, discrimination or violation of antitrust laws.[6] Where there is routine discounting from the tariff rates, the tariff rates are just a maximum amount the carriers can charge and the carrier has wide discretion to choose the rate at the time of service. The filed rate doctrine does not apply in such circumstances. *Sec. Servs. V. Kmart Corp.*, 511 U.S. 431, 444 (1994).

There are important fact questions that need to be resolved through discovery before applying the filed rate doctrine, including whether Cathay Pacific's transpacific fares and fuel surcharges at issue in this case have been filed, and whether there has been "meaningful" review of Cathay Pacific's rates. Even if Cathay Pacific submitted filings with the DOT, the true extent of its filed rate defense can only be appropriately evaluated through discovery. *See Gallo*, 503 F.3d at 1049 (summary judgment denied where there were factual issues concerning the existence of the *Keogh* defense).

Whether the DOT has conducted "meaningful" review of filings is important to the determination of the applicability of the filed rate doctrine in this case and can only be ascertained through discovery. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393 (9th Cir. 1992), the Ninth Circuit addressed whether insurance rates filed with Arizona and Wisconsin regulatory agencies were entitled to protection under the filed rate doctrine. In both states, insurance companies were required to file their insurance rates with state regulatory agencies that had the power to disapprove the rates. The Court observed that the "absence of meaningful state review allows the insurers to file any rates they want." 982 F.3d at 394. "[I]f those rates were the product of unlawful activity prior to their being filed and were not subject to meaningful review by the state, then the fact they were filed does not make them immune from challenge." *Id. see also Wileman Bros. & Elliott, Inc.v. Giannini,* 909 F.3d 332, 337-338 (9th Cir. 1990) ("[t]he mere fact of failure [by the Secretary of Agriculture] to disapprove [rates], however, does not legitimize otherwise anti-competitive conduct.").[7]

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[6] Statement of Enforcement Policy on Rebating, 53 Fed. Reg. 41353, 41354 (D.O.T. Oct. 21, 1988). RJN, Exhbit EE.

[7] In a recent Ninth Circuit decision on the filed rate doctrine, Judge Fletcher in a concurring opinion cautioned against expanding the application of the filed rate doctrine to situations where regulatory agencies do not have a standard for the determination of just and reasonable rates or

Plaintiffs respectfully submit that this Court need not determine these questions now to rule on Cathay Pacific's motion to dismiss. Cathay Pacific has not proffered factual support for its filed rate argument and the CAC does not supply the basis

B. Plaintiffs Have Properly Pleaded A Conspiracy Under *Twombly* and *Iqbal*[8]

The CAC contains well over two hundred paragraphs of detailed fact allegations concerning the existence and scope of the Transpacific Passenger Air conspiracy, and Cathay Pacific's participation in that conspiracy. CAC ¶¶ 53-294. These detailed allegations are far beyond the "plausibility" required under *Twombly* and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) ("*Iqbal*"). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Twombly,* 550 U.S. at 555. Plaintiffs are only required to plead in general terms "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. Two weeks after issuing *Twombly*, the Supreme Court clarified that *Twombly* did not signal a switch to fact-pleading in the federal courts: "Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what … the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). *Iqbal* did not make this standard any stricter, but simply clarified that it applies to all civil actions, not just antitrust cases. *See Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) ("*Al-Kidd*") (*Iqbal* effectuated no sea change in the law).

Antitrust cases should not be subject to a higher pleading standard than other cases. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000) ("*Knevelbaard Dairies*"). An antitrust plaintiff "need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws." *Id.*

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have not exercised active oversight. *Gallo,* 503 F.3d at 1049-50. *See also* IA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 242b at p.32 (2d ed. 2000) ("[w]hen the agency merely rubber-stamps private proposals or permits regulated firms to engage in anticompetitive practices with no substantial oversight, then antitrust immunity cannot be claimed for those practices.")

[8] Cathay Pacific makes the same arguments as set forth in Defendants' Joint Motion to Dismiss. Plaintiffs hereby incorporate by reference the entirety of their Oppositions to Defendants' Joint Motion to Dismiss.

(quoting *Cost Management Services*, 99 F.3d at 944). Post-*Twombly* decisions from this district and elsewhere confirm that notice pleading is still the applicable standard for antitrust complaints. *See e.g., Starr v. Sony BMG Entertainment,* No. 08-5637-cv, 2010 U.S. App. LEXIS 768 at *7-*8 (2d Cir. Jan. 13, 2010); *In re Flash Memory Antitrust Litig.,* 643 F. Supp. 2d 1133 (N.D. Cal. 2009); *In re Static Random Access Memory Antitrust Litig.*, 580 F. Supp.2d 896, 900 (N.D.Cal. 2008).

Plaintiffs have far more than met this threshold by proffering specific evidence of "price coordination" efforts between Cathay Pacific and other defendants. The allegations of the CAC describe not only lockstep price changes but also explicit agreements and collusive communications. Specifically:

- Cathay Pacific participated in the conspiracy by sharing commercially sensitive information through its code sharing agreements with competitors. CAC ¶¶ 54-56.
- Cathay Pacific participated directly or indirectly in industry meetings that have been deemed to be inherently anticompetitive by antitrust officials in the U.S., Europe and Australia. CAC ¶¶ 66-71, 85, 89-99.
- Cathay Pacific and other defendants participated in meetings hosted by regional trade associations in which anticompetitive conduct was encouraged or tolerated. CAC ¶¶ 72-76.
- Cathay Pacific and other defendants participated in meetings at which agreements to coordinate increased base passenger fares were reached. CAC ¶¶ 111-80.
- Cathay Pacific and other defendants participated in meetings at which passenger fares were discussed and the use of IATA fares for benchmarking non-immunized fares was agreed upon. CAC ¶¶ 83-105.
- Cathay Pacific and other defendants participated directly or indirectly in meetings at which agreements to coordinate fuel surcharges were reached. CAC ¶¶ 185, 188, 204-235.

- Cathay Pacific and other defendants raised fares and surcharges more than the amounts necessary to offset increased costs, and in a manner inconsistent with a competitive market. CAC ¶¶ 237-44.
- Cathay Pacific instituted surcharges in close proximity to those of its competitors, in sharp contrast to conduct that occurred period to the Class Period. CAC ¶¶ 191-203.
- Cathay Pacific participated in discussions with its competitors on fares and fuel surcharges. CAC Exhibits B-G.
- Criminal charges were filed against Cathay Pacific by government enforcement agencies in the Untied States, Australia, and New Zealand for its participation in an international cartel to fix air cargo fares and surcharges. CAC ¶¶ 275-77, 282, 289. Cathay Pacific pleaded guilty to price-fixing and paid a $60 million fine in 2008 after the U.S. Department of Justice commenced criminal investigation of air cargo rates on international flights to and from the United States. CAC ¶275.

A plausible claim that satisfies scrutiny of dismissal motions "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1950 (citing *Twombly*, 550 U.S. at 556). "'Asking for plausible grounds to infer' the existence of a claim for relief 'does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' to prove that claim." *Al-Kidd*, 580 F.3d at 977, (quoting *Twombly*, 550 U.S. at 556). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1003 (9th Cir. 2008). The Court must consider the complaint as it has been alleged; the defendants may not ignore or recast plaintiffs' allegations. *Knevelbaard Dairies*, 232 F.3d at 989-90. Moreover, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (citation omitted).

Cathay Pacific ignores the substantial and detailed factual allegations of explicit agreements and collusive communications in the CAC. *See e.g.* CAC ¶¶ 111-79 (coordination of base fare prices); ¶¶ 204-35 (coordination of fuel surcharges). Cathay Pacific has previously admitted guilt and apologized for anticompetitive conduct that took place in the closely related air cargo market on routes between Hong Kong and the United States during the Class Period. *Id.* ¶¶ 275-76. These averments, taken as a whole, cannot be read narrowly to infer only parallel pricing.

This Court denied Continental Airlines' motion to dismiss the CAC based on *Twombly*. It noted that *Twombly* does not impose a probability standard, and stated that the allegations of the CAC are "not illogical" and do not "defy common sense." Transcript of Hearing of November 13, 2009, at 10-11. Plaintiffs respectfully submit that the same conclusion should be drawn here.

IV. CONCLUSION

Cathay Pacific's motion to dismiss should be denied.

Dated: January 22, 2010

Respectfully submitted,

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